Koperasi Tanjong Keramat Malaysia Bhd (previously known as Koperasi Tanjong Keramat Kota Kinabalu Bhd) v Myangkasa Holdings Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCvC-219–04 OF 2022
GAN TECHIONG JC
28 AUGUST 2024

Contract — Agreement — Dealership agreement — Breach — Agreed monthly income was not paid by defendants to plaintiff pursuant to dealership agreement — Whether defendants breached dealership agreement — Whether first defendant ought to be held jointly and severally liable to pay plaintiff in accordance with terms of their contract — Whether plaintiff's rights to claim periodic payments of 'advertising income' as defined in dealership agreement was barred by Limitation Act 1953 — Limitation Act 1953 s 6

The plaintiff was a co-operative society to promote the economic interest of its members in accordance with co-operative principles. The first defendant was the mastermind of a project which it had named as 'Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program'. The plaintiff signed a dealership agreement with the defendants on 22 May 2015, wherein the first defendant was referred to as 'the master distributor', the plaintiff as 'the dealer', and the second defendant as 'the advertiser'. Under the dealership agreement, the plaintiff was required to pay RM3m plus a 5% 'administrative and processing costs' of RM150,000 to the first defendant. By paying a total sum of RM3.15m to the first defendant, the plaintiff would receive from the second defendant (to be paid through the first defendant) a sum of RM75,000 per month for 60 months, ie a total of RM4.5m to benefit the plaintiff and its co-operative members. However, the first defendant did not pay any money to the plaintiff, which led to the plaintiff suing both defendants by way of this suit. The plaintiff had entered a default judgment against the second defendant. The first defendant on the other hand disclaimed liability under the dealership agreement and pleaded that: (a) the plaintiff should claim only from the second defendant; and (b) the plaintiff's claim was barred by the Limitation Act 1953 ('the LA'). The issues for consideration were: (i) whether the defendants had breached the dealership agreement; (ii) whether the first defendant ought to be held jointly and severally liable to pay the plaintiff in accordance with the terms of their contract; and (iii) whether the plaintiff's rights to claim periodic payments of 'advertising income' as defined in the dealership agreement was barred by the LA.

Held:

(1) Clause 2.1(iii) made it crystal clear that it was the responsibility of the first defendant to collect the agreed advertising income from the second defendant and to pay the same into the plaintiff's bank account within thirty days from the receipt. The role and obligation of the first defendant to collect the advertising income of RM75,000 per month from the second defendant was also evident in cl 2.3(ii) of the dealership agreement which provided that the second defendant was to pay the plaintiff through the first defendant. After receiving the RM3.15m from the plaintiff, the first defendant paid over RM3m to the second defendant, paid out RM150,000 to someone purportedly as 'commission' but did not pay any advertising income to the plaintiff. Section 38 of the Contracts Act 1950 made it mandatory for the first defendant to perform its promises. Failure to perform would amount to a breach contract, and the first defendant was liable for breach of contract. It was necessary to ensure that there was no unjust enrichment of the plaintiff. The plaintiff's claim for a refund of RM3.15m and also advertising income amounting to RM4.5m would be a duplicity of claims. There was no provision in the dealership agreement for repayment of RM3.15m. A grace period of 90 days to complete the preparation, installation and fitting of the advertising area was from date of the dealership agreement on 22 May 2015 till 20 August 2015. The first month period when advertising income began to become payable was therefore from 20 August 2015, rendering the first monthly payment of RM75,000 payable on 19 September 2015 and the 60th payment due on 19 August 2020 (see paras 38–39, 46–47, 49 & 51).

(2) Only part of the plaintiff's claim was statute-barred. The first defendant's promise was a recurring contractual obligation. Each time the first defendant failed to pay the periodic advertising income when it fell due, it was a discrete breach of contract giving rise to a new cause of action. However, there was no 'running account' in this case because the defendants did not make even a single payment. The debt that accrued earlier than six years prior to the filing of the writ of summons would be barred by s 6 of the LA. Therefore, the plaintiff's cause of action was 'alive' only to claim the sum of advertising income that had accrued less than six years prior to the date of the filing of the writ of summons. As the writ of summons was filed on 18 April 2022, a contractual claim for any cause of action that arose prior to 18 April 2016 would be barred by s 6(1)(a) of the LA. This meant that the plaintiff's claim for the advertising income for the seven months period between 19 September 2015 and 19 March of 2016 were barred by the LA. Thus, the plaintiff's claim must be reduced by seven months, from 60 months to a period of 53 months. The computation works out as follows: RM75,000 x 53 months = RM3.975m. Though the primary paying party was the second

A defendant, the first defendant ought to be held jointly and severally liable to pay the sum to the plaintiff (see paras 53–54, 56–57 & 59).

[Bahasa Malaysia summary

B Plaintif adalah sebuah pertubuhan koperasi untuk mempromosikan kepentingan ekonomi ahlinya selaras dengan prinsip-prinsip koperasi. Defendan pertama adalah perancang utama projek yang dinamakan 'Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program'. Plaintif telah menandatangani perjanjian pengedaran dengan defendan-defendan pada 22 Mei 2015, di mana defendan pertama dirujuk sebagai 'pengagih utama', C plaintif sebagai 'peniaga', dan defendan kedua sebagai 'pengiklan'. Di bawah perjanjian pengedaran tersebut, plaintif dikehendaki membayar RM3 juta serta 5% 'kos pentadbiran dan pemprosesan' berjumlah RM150,000 kepada defendan pertama. Dengan membayar jumlah keseluruhan RM3.15 juta kepada defendan pertama, plaintif akan menerima daripada defendan kedua D (untuk dibayar melalui defendan pertama) jumlah RM75,000 sebulan selama 60 bulan, iaitu sejumlah RM4.5 juta untuk manfaat plaintif dan ahli-ahli koperasinya. Walau bagaimanapun, defendan pertama tidak membayar sebarang wang kepada plaintif, yang menyebabkan plaintif menyaman E kedua-dua defendan melalui saman ini. Plaintif telah memasukkan penghakiman ingkar terhadap defendan kedua. Defendan pertama pula menafikan liabiliti di bawah perjanjian pengedaran tersebut dan berhujah bahawa: (a) plaintif sepatutnya menuntut hanya daripada defendan kedua; dan (b) tuntutan plaintif dihalang oleh Akta Had Masa 1953 ('AHM'). Isu-isu F untuk pertimbangan adalah: (i) sama ada defendan-defendan telah melanggar perjanjian pengedaran; (ii) sama ada defendan pertama patut dipertanggungjawabkan secara bersama dan berasingan untuk membayar plaintif mengikut terma kontrak mereka; dan (iii) sama ada hak plaintif untuk menuntut bayaran berkala 'pendapatan pengiklanan' seperti yang ditakrifkan G dalam perjanjian pengedaran dihalang oleh AHM.

Diputuskan:

(1) Klausa 2.1(iii) menjelaskan dengan nyata bahawa adalah tanggungjawab defendan pertama untuk mengutip pendapatan pengiklanan yang H dipersetujui daripada defendan kedua dan membayarnya ke dalam akaun bank plaintif dalam tempoh tiga puluh hari dari penerimaan. Peranan dan kewajipan defendan pertama untuk mengutip pendapatan pengiklanan sebanyak RM75,000 sebulan daripada defendan kedua juga jelas dalam klausa 2.3(ii) perjanjian pengedaran yang memperuntukkan I bahawa defendan kedua hendaklah membayar plaintif melalui defendan pertama. Setelah menerima RM3.15 juta daripada plaintif, defendan pertama telah membayar lebih RM3 juta kepada defendan kedua, mengeluarkan RM150,000 kepada seseorang yang kononnya sebagai 'komisen' tetapi tidak membayar sebarang pendapatan pengiklanan

kepada plaintif. Seksyen 38 Akta Kontrak 1950 mewajibkan defendan pertama untuk melaksanakan janjinya. Kegagalan melaksanakan janji tersebut akan menjadi pelanggaran kontrak, dan defendan pertama bertanggungjawab atas pelanggaran kontrak. Adalah perlu untuk memastikan tiada pengayaan tidak adil terhadap plaintif. Tuntutan plaintif untuk pengembalian RM3.15 juta dan juga pendapatan pengiklanan berjumlah RM4.5 juta akan menjadi tuntutan yang bertindih. Tiada peruntukan dalam perjanjian pengedaran untuk pembayaran balik RM3.15 juta. Tempoh tangguh selama 90 hari untuk menyelesaikan penyediaan, pemasangan dan pemadanan kawasan pengiklanan adalah dari tarikh perjanjian pengedaran pada 22 Mei 2015 hingga 20 Ogos 2015. Oleh itu, tempoh bulan pertama apabila pendapatan pengiklanan mula perlu dibayar adalah dari 20 Ogos 2015, menjadikan bayaran bulanan pertama RM75,000 perlu dibayar pada 19 September 2015 dan bayaran ke-60 perlu dibayar pada 19 Ogos 2020 (lihat perenggan 38–39, 46–47, 49 & 51).

(2) Hanya sebahagian daripada tuntutan plaintif dihalang oleh statut. Janji defendan pertama adalah kewajipan kontrak yang berulang. Setiap kali defendan pertama gagal membayar pendapatan pengiklanan berkala apabila ia perlu dibayar, ia merupakan pelanggaran kontrak berasingan yang menimbulkan kausa tindakan baharu. Walau bagaimanapun, tiada 'akaun berterusan' dalam kes ini kerana defendan-defendan tidak membuat walaupun satu pembayaran. Hutang yang terakru lebih awal daripada enam tahun sebelum pemfailan writ saman akan dihalang oleh s 6 AHM. Oleh itu, kausa tindakan plaintif 'hidup' hanya untuk menuntut jumlah pendapatan pengiklanan yang terakru kurang daripada enam tahun sebelum tarikh pemfailan writ saman. Memandangkan writ saman difailkan pada 18 April 2022, tuntutan kontrak bagi mana-mana kausa tindakan yang timbul sebelum 18 April 2016 akan dihalang oleh s 6(1)(a) AHM. Ini bermakna tuntutan plaintif untuk pendapatan pengiklanan bagi tempoh tujuh bulan antara 19 September 2015 dan 19 Mac 2016 dihalang oleh AHM. Oleh itu, tuntutan plaintif mesti dikurangkan sebanyak tujuh bulan, dari 60 bulan kepada tempoh 53 bulan. Pengiraan adalah seperti berikut: RM75,000 x 53 bulan = RM3.975 juta. Walaupun pihak pembayar utama adalah defendan kedua, defendan pertama patut dipertanggungjawabkan secara bersama dan berasingan untuk membayar jumlah tersebut kepada plaintif (lihat perenggan 53–54, 56–57 & 59).]

Cases referred to

Anuar bin Abu Bakar v Samsuri bin Booyman [2016] 6 MLJ 96, CA (folld)
Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals [2024] 5 MLJ 897, FC (refd)
Pickering Square Inc v Trillium College Inc 2016 ONCA 179, CA (folld)

Legislation referred to

Co-operative Societies Act 1993 s 7(1)
Contracts Act 1950 s 38
Evidence Act 1950 s 92
Limitation Act 1953 ss 6, 6(1)(a), 26(2)

Lam Wai Tze (with William Tan Phoo Yie (Pupil in Chambers)) (Lam Wai Tze & Co) for the plaintiff.
Muhammed Zahid Hazim bin Kasim (NK Tan & Rahim) for the defendants.

Gan Techiong JC:

INTRODUCTION

[1] In this case, the plaintiff, which is a co-operative society, had paid the first defendant a sum of RM3.15m but has not even received a single sen in return from the defendants.

[2] The plaintiff's cause of action is founded on a tripartite agreement made between the plaintiff and the defendants dated 22nd May 2015, described by the parties as a dealership agreement ('the said dealership agreement'). The main issues for determination are whether the defendants have breached the said dealership agreement and if so, whether the first defendant ought to be held jointly and severally liable to pay the plaintiff in accordance with the terms of their contract, and lastly, whether the plaintiff's rights to claim periodic payments of 'Advertising Income' (*as defined in the said dealership agreement*) is barred by the Limitation Act 1953.

[3] After a full trial, this court decided to grant judgment in favour of the plaintiff, holding the first defendant jointly and severally liable with the second defendant to pay a sum of RM3,975,000 to the plaintiff, which is a sum of RM75,000 payable over a period of 53 months.

[4] My reasons for finding that only part of the plaintiff's claim is barred by the Limitation Act 1953 and that the defendants are jointly and severally liable to pay the plaintiff the sum of RM3,975,000 are as set out below.

BACKGROUND FACTS

[5] The plaintiff is a co-operative society that is registered under s 7(1) of the Co-operative Societies Act 1993 to promote the economic interest of its members in accordance with co-operative principles.

[6] The first defendant is the mastermind of a project which it had named as

'Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program' ('the first defendant's project'). A

[7] The plaintiff, which was invited to participate in the first defendant's project, was asked to sign the said dealership agreement with the defendants, wherein the first defendant is referred to as 'the Master Distributor', the plaintiff as 'the Dealer', and the second defendant as 'the Advertiser'. B

[8] Though rather poorly drafted, the said dealership agreement is clear enough in setting out the performance required of each party. The preamble contains several representations made to the party referred to as 'the Dealer' (the plaintiff in this case), in para C of the preamble and cl 1.1 thereof, as follows: C

> C. The Advertiser is a licensed Mobile Virtual Network Aggregator ('MVNA') in Malaysia and carrying on the business of mobile telecommunications services and operates a network of third party payment terminals that offer services and products to subscribers and customers for the purchase of prepaid top-ups, ticketing, online transaction services, registration, loyalty point programs and bill payment collection via internet banking, mobile banking and mobile payment. D

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while cl 1.1(e) thereof contains the following definition:

> (e) 'MyANGKASA Mobile Branded Concept Store' means 1,500 stores currently being managed and operated by the Advertiser's authorised dealers that have been selected and qualified for a store remodeling program.

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[9] Clause 1.1(e) was an unequivocal representation that at the material time, the second defendant (referred to as 'the Advertiser' therein) had authorised dealers who were managing and operating as many as 1,500 stores that qualified for a store remodeling program. G

[10] The role and involvement of the first defendant (referred to as 'the Master Distributor' in the said dealership agreement) was stated in cl 1.1(g) as follows:

> (g) 'Master Distributor' means authorised person to distribute the 1,500 dealerships of the Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program with the attached rights to the 1,500 Advertising Areas at a prescribed Fee of RM50,000.00 per unit ('Fee') which shall in turn be further leased to the Advertiser during the Agreement Period. H

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[11] As shown in cl 1.1(g), the said dealership agreement — which was prepared by the first defendant — included a representation that as the Master Distributor, the first defendant is authorised to distribute 1,500 dealerships which were attached to 1,500 advertising areas at a fee of RM50,000 per unit,

which shall in turn be leased to the Advertiser (the second defendant).

[12] The commitment and performance required from the plaintiff was just to pay RM3m plus a 5% 'administrative and processing costs' of RM150,000 to the first defendant. This was set out in cl 2.2(iv) of the said dealership agreement:

> 2.2 The Dealer shall:
>
> (iv) pay the Fee of RM3,150,000.00 (RINGGIT MALAYSIA: THREE MILLION ONE HUNDRED FIFTY THOUSAND ONLY) to the Master Distributor for 60 units of the Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program with the attached full/partial rights over the Advertising Area(s) at a prescribed Fee of RM50,000 per unit together with the administrative and processing costs incurred by the Master Distributor amounting to five percent (5%) of the Fee upon signing of this Agreement.

[13] The second defendant's obligations (as 'the Advertiser') are stated in cl 2.3 of the said dealership agreement, as follows:

> 2.3 The Advertiser shall:
>
> (i) lease the Advertising Area(s) witht he required advertising space as illustrated in Annex 1, from the Dealer commencing from the date hereof ('Effective Date') and ending on the expiry date of the Agreemnet Period;
>
> (ii) pay the Dealer through the Master Distributor:
>
> (a) Lease advertising rental income fixed at RM75,000.00 (RINGGIT MALAYSIA: SEVENTY FIVE THOUSAND ONLY) per month for the duration of 60 MONTHS; and

[14] A Ringgit and sen summary of the said dealership agreement hatched by the first defendant would be that by paying a total sum of RM3.15m to the first defendant, the plaintiff would receive from the second defendant (*to be paid through the first defendant*) a sum of RM75,000 per month for 60 months, ie a total of RM4.5m to benefit the plaintiff and its co-operative members.

[15] It is undisputed that the plaintiff paid the full sum of RM3.15m to the first defendant to perform its part of the said dealership agreement.

[16] It is also undisputed that the first defendant did not pay any money to the plaintiff, which led to the plaintiff suing both defendants by way of this civil suit.

THE PLAINTIFF'S CLAIM

[17] The plaintiff's claim is for a full refund of RM3.15m paid to the first defendant and RM4.5m being the total advertising income that it ought to have received under the said dealership agreement, interest and costs.

[18] The sum of RM4.5m is the total amount that the plaintiff is entitled to receive if the monthly 'advertising income' of RM75,000 per month had been duly paid for a period of 60 months.

THE DEFENDANTS' DEFENCE

[19] As the second defendant had failed to defend itself, the plaintiff had entered default judgment against it but failed to recover any payment. Thus, it was necessary for the plaintiff to proceed with its claim against the first defendant.

[20] The first defendant's defence was a mere denial, disclaiming liability under the said dealership agreement and pleading that the plaintiff should claim only from the second defendant.

[21] As mentioned above, it was also pleaded by the first defendant that the plaintiff's claim is barred by the Limitation Act 1953.

THE PLAINTIFF'S WITNESS

[22] The plaintiff's sole witness ('SP1') was one Miss Koid Chin Lin who is also known as 'Suli'. She testified in her position as the Chief Executive Officer of the plaintiff — which she confirmed is a co-operative society.

[23] The plaintiff's said witness testified that the plaintiff trusted the first defendant because it is a subsidiary of a leading co-operative society, namely Angkatan Koperasi Kebangsaan Malaysia Bhd, commonly known as ANGKASA. According to her, ANGKASA issued an invitation letter to the plaintiff in April 2015 and represented, inter alia, that the second defendant had 1,500 MyANGKASA Mobile Branded Concept Stores under its wings.

[24] SP1 further confirmed that the sum of RM3.15m was paid by the plaintiff to the first defendant by using a CIMB Bank cheque on 22 May 2015 after the said dealership agreement was signed.

[25] In short, this witness's evidence was plain and simple; that there was a breach of contract by the first defendant because RM3.15m was paid to the first defendant pursuant to the said dealership agreement but not a sen of the agreed

A monthly advertising income of RM75,000 was paid by the defendants to the plaintiff pursuant to the said agreement.

[26] In a nutshell, SP1 takes the stand that the plaintiff is entitled to a full refund of the RM3.15m and also the sum of RM4.5m that was agreed to be paid to the plaintiff under the said dealership agreement.

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THE FIRST DEFENDANT'S WITNESSES

[27] The first defendant called two witnesses. Its first witness was one Dato' Sri Dr Eric Yap ('SD1') who was subpoenaed to attend as a witness for the first defendant. He testified that he invested RM12m in the second defendant, was appointed a director but knew nothing at all about the business of the second defendant. SD1 specifically stated that he has no knowledge whatsoever about the said dealership agreement.

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[28] The first defendant's second witness was one Shaharuddin bin Mohamed ('SD2'), who was the Executive Director-General of the first defendant at the material time. He testified that the RM3m received from the plaintiff was paid over by the first defendant to the second defendant while the 'administrative and processing costs' of RM150,000 was paid by the first defendant to a woman by the name of Fatin Liyana bt Hossin as her commission.

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F **[29]** In his evidence, SD2 testified that the recipient of the RM150,000 collected from the plaintiff as 'administrative and processing costs', namely Fatin Liyana bt Hossin, was a marketing agent appointed by the first defendant.

G **[30]** Payment of RM3m to the second defendant was duly proven by SD2 but payment of RM150,000 was not proven. The recipient Fatin Liyana bt Hossin was not called as a witness. SD2, who did not have a copy of the first defendant's cheque, could not prove the identity of the payee named in the first defendant's cheque for RM150,000.

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[31] The evidence of SD2 could be summed up as the first defendant disclaiming liability under the said dealership agreement and attempting to shift responsibility and liability to the second defendant.

I ANALYSIS OF THE EVIDENCE ADDUCED BY BOTH SIDES

[32] Since the plaintiff's claim is a contractual claim based on the said dealership agreement, I have noted that it is the sole agreement that both sides are relying on as their contract — as in there is neither any supplementary

agreement nor any written agreed variation of its terms and conditions.

[33] There was also no attempt by any party to rely on the exceptions under s 92 of the Evidence Act 1950 to admit any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the said dealership agreement.

[34] Thus, the contract is to be construed solely from the terms and conditions of the said dealership agreement while the issue of performance of contract to be adjudicated based on the evidence adduced by both sides.

[35] In my judgment, the fact that the first defendant is a subsidiary of Angkatan Koperasi Kebangsaan Malaysia Bhd ('ANGKASA') is irrelevant. As mentioned above, the parties are bound by terms and conditions of the said dealership agreement — to which ANGKASA is not a party.

[36] There is no dispute regarding performance by the plaintiff that had paid the full sum of RM3.15m to the first defendant, by using a CIMB Bank cheque No 006380 on 22 May 2015 after the said dealership agreement was signed.

[37] The promises made by the defendants under the said dealership agreement are in cl 2.1(iii), 2.3 and 4.2 thereof, which screenshots are pasted below:

2.1 The Master Distributor shall:

(i) carry out and execute the Dealer's obligations under this Agreement as facilitator and coordinator on behalf the Dealer and not as the guarantor to Dealer in respect of the Advertising Income as stated in 2.3(iii) hereinbelow;

(ii) assign a dealer code to the Dealer for direct sales of My ANGKASA mobile operator's products and services; and

(iii) collect the Advertising Income from the Advertiser under this Agreement and disburse the said Advertising Income to the Dealer within thirty (30) days from date of receipt from the Advertiser directly to the Dealer's bank account.

4.2. In consideration for the Dealer granting the lease of the Advertising Area(s) to the Advertiser, the Advertiser shall pay the Advertising Income through the Master Distributor on a monthly basis and no later than thirty (30) days after the end of the month by cheque/bank draft or whichever appropriate transaction through financial institution preferable by the Master Distributor.

[38] Clause 2.1(iii) makes it crystal clear that it was the responsibility of the first defendant (the Master Distributor) to collect the agreed advertising income from the second defendant (the Advertiser) and to pay the same into the plaintiff's bank account within thirty days from the receipt. Even though cl 2.1(i) does state that the first defendant is not a guarantor, cl 2.1(iii) clearly made it the first defendant's contractual obligation to collect the advertising income every month. It is not a matter of discretion for the first defendant, as could be seen from its wording below:

> 2.1 The Master Distributor shall:
>
> (iii) collect the Advertising Income from the Advertiser under this Agreement and disburse the said Advertising Income to the Dealer within thirty (30) days from the date of receipt from the Advertiser directly to the Dealer's bank account.

[39] The role and obligation of the first defendant to collect the advertising income of RM75,000 per month from the second defendant is also evident in cl 2.3(ii) of the said dealership agreement which provides that the second defendant (the Advertiser) is *to pay* the plaintiff (the Dealer) 'through the Master Distributor' ie the first defendant.

> 2.3 The Advertiser shall:
>
> (i) lease the Advertising Area(s) with the required advertising space as illustrated in Annex 1, from the Dealer commencing from the date hereof ('Effective Date') and ending on the expiry date of the Agreement Period;
>
> (ii) pay the Dealer through the Master Distributor:
>
> (a) Lease advertising rental income fixed at RM75,000.00 (RINGGIT MALAYSIA: SEVENTY FIVE THOUSAND ONLY) per month for the duration of 60 months; and

[40] The essence of the said dealership agreement is that by making a single lump sum payment of RM3m as 'the Fee' to the first defendant to secure 60 units of the first defendant's 'Adopt a Shop — MyANGKASA Mobile Branded Concept Stores Program', the first defendant shall collect 'advertising income' of RM75,000 every month from the second defendant and pay over the RM75,000 to the plaintiff for a period of 60 months. In addition to the RM3m, the plaintiff was also charged an 'administrative and processing costs' of RM150,000.

[41] It was proven by the first defendant that it had paid over RM3m to the second defendant but adduced no cogent evidence to prove that RM150,000 was paid over to Fatin Liyana bt Hossin. I make this finding due to two reasons.

[42] First, the plaintiff's evidence of previous dealings with ANGKASA (the holding company of the first defendant) was unrebutted. It was ANGKASA

that invited the plaintiff to participate in the first defendant's project. In other words, the parties were not strangers that require introduction by someone by the name of Fatin Liyana bt Hossin — and to pay her RM150,000 for the 'introduction'.

[43] The evidence of the plaintiff's witness ('SP1') in her witness statement, in answer to Q7 and Q8 respectively, made it abundantly clear that there was no introduction because they had previous dealings with each other. SP1 further testified that the plaintiff was not aware of any person being paid a commission. A screenshot of her answers in Q7 and Q8 of her witness statement are pasted below:

7. S: Adakah Puan Suli tahu bagaimana Plaintif mengenali Defendan Pertama?

J: Defendan Pertama merupakan anak syarikat milik penuh Angkatan Koperasi Kebangsaan Malaysia Berhad [selepas ini dirujuk sebagai "ANGKASA"] yang mana ANGKASA merupakan salah sebuah koperasi puncak di Malaysia yang di antara lain, mengedarkan kod kredit ANGKASA untuk tujuan tolakan gaji kakitangan-kakitangan kerajaan atau pekerja-pekerja untuk syarikat-syarikat tertentu bagi tujuan bayaran balik ansuran bulanan untuk pinjaman-pinjaman yang diambil oleh kakitangan-kakitangan kerajaan atau pekerja-pekerja syarikat-syarikat berkenaan yang merupakan ahli-ahli koperasi yang mengambil pinjaman daripada koperasi-koperasi.

8. S: Adakah Plaintif berada dalam hubungan yang baik dengan ANGKASA?

J: Ya, Plaintif adalah dalam hubungan yang baik dengan ANGKASA pada masa yang material memandangkan Plaintif turut menggunakan kod kredit ANGKASA bagi tujuan tolakan gaji ahli-ahli koperasi Plaintif yang telah mengambil pinjaman daripada Plaintif untuk tujuan bayaran ansuran

A bulanan pinjaman ahli-ahli berkenaan kepada Plaintif. Selain itu, Plaintif juga pernah berurusan dengan ANGKASA dalam beberapa projek dan/atau program yang menglibatkan ANGKASA dan/atau anak-anak syarikat ANGKASA dan/atau diperkenalkan oleh ANGKASA dan/atau diperkenalkan oleh anak-anak syarikat ANGKASA kepada Plaintif.

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C **[44]** The second reason for my doubting that RM150,000 was paid by the first defendant to the said Fatin Liyana bt Hossin is that the first defendant's payment voucher was not signed by her — who was not called as a witness by the first defendant. There was also no copy of the cheque purportedly issued to her by the first defendant in evidence. The fact that RM150,000 was paid out of the first defendant's bank account does not ipso facto prove the identity of the recipient. A further reason for finding this payment of RM150,000 to be a dubious payment is that it was described in the said dealership agreement as 'administrative and processing costs' payable by the plaintiff to the first defendant but in the first defendant's evidence, it was stated to be payment of 'Commission Adopt a Shop'. A screenshot of the relevant portion of the payment voucher is pasted below:

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MYANGKASA HOLDINGS SDN BHD

48

PAYMENT VOUCHER

PV NO.

DATE 23/6/15

A/c Code	Particular	Amount (RM)
	Commission - Adopt A Shop	150,000.00

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[45] The same signature appears as the signature of the verifier and the recipient in the signing part of the voucher, meaning that the staff of the first defendant company who verified the payment voucher had also signed to acknowledge receipt of the said cheque. A screenshot of the same is pasted below:

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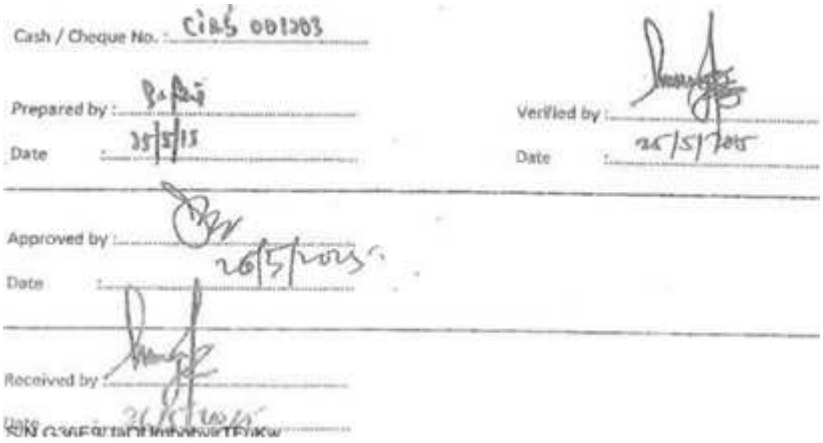
Cash / Cheque No. : CIA5 001303

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[46] In summary, the facts prove that after receiving the RM3.15m from the plaintiff, the first defendant paid over RM3m to the second defendant, paid out RM150,000 to someone purportedly as 'commission' but paid not even a Ringgit of advertising income to the plaintiff. Even though the identity of the recipient of RM150,000 and justification for the payment as 'commission' are questionable, those are facts that are relevant for this court to weigh the conduct of the first defendant. The more significant point is that s 38 of the Contracts Act 1950 makes it mandatory — with the word 'must' — for the first defendant to perform its promises. The said s 38 makes it mandatory for performance with the following words:

> (1) The parties to a contract *must* either *perform*, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.

[47] The plaintiff in this case did not dispense with performance. Neither is there any law to excuse the first defendant from performing its promises under the said dealership agreement. In the circumstances, failure to perform would amount to a breach contract, and this court is bound to find the first defendant liable for breach of contract. If any authority is required on this point, I would rely on two authorities. First, I am guided by the judgment of Abang Iskandar bin Abang Hashim JCA (as the Rt Hon PCA then was) in *Anuar bin Abu Bakar v Samsuri bin Booyman* [2016] 6 MLJ 96 where His Lordship held:

> [24] As such, the joint venture agreement was valid and was binding on the contracting parties. That joint venture agreement contained certain terms that would require the defendant to do certain things in favour of the plaintiff. Among them has been a term that obligated the defendant to transfer ten titles of the newly sub divided Lot 1971 to the plaintiff. In fact, there was no dispute on this term per se. ...

A It is also clearly provided under *s 38* of the *Contracts Act 1950* that a party to a contract must, unless excused under the Contracts Act or any other law, be bound by the terms of the contract so entered between them.

B **[48]** The judgment of the Court of Appeal in *Anuar bin Abu Bakar v Samsuri bin Booyman* was approved by the Federal Court very recently in a landmark judgment in *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] 5 MLJ 897. The application of s 38 of the Contracts Act 1950 in compelling parties to a contract to perform their respective promises was reiterated in the judgment of Hasnah bt Dato' Mohammed Hashim FCJ (as the current Rt Hon CJM then was), as follows:

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> [28] *It is trite law that the parties to a contract are bound by the terms of the contract entered between them to perform their respective promises*. It is also clearly provided *under s 38 of the Contracts Act 1950 that a party to a contract must, unless excused under the Contracts Act or any other law, be bound by the terms of the contract so entered between them*. There is no dispute between parties that the SPA has been concluded. The terms of the SPA are clear and unambiguous and the plaintiff is bound by it. Plaintiff is therefore estopped from denying what had been agreed between them (see Court of Appeal in *Anuar bin Abu Bakar v Samsuri bin Booyman* [2016] 6 MLJ 96; [2016] 8 CLJ 317).

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[49] Even though this court should do justice to the plaintiff — which is a cooperative society that had paid RM3.15m to the first defendant by using contributions made by its members — it is necessary to ensure that there is no unjust enrichment of the plaintiff. The plaintiff's claim for a refund of RM3.15m and also advertising income amounting to RM4.5m would be a duplicity of claims. There is no provision in the said dealership agreement for repayment of RM3.15m. As discussed above, what is clearly there is a term for payment of a contractual sum of RM75,000 per month, as advertising income, for a period of 60 months.

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[50] Pursuant to cl 4.3 of the said dealership agreement, the second defendant was given a grace period of 90 days from the effective date to complete the preparation, installation and fitting of the advertising area — as defined in cl 1.1(f) that states:

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> (f) 'Grace Period' means the period of ninety (90) days from the Effective Date for the Advertiser to complete the preparation, installation and fitting of the Advertising Area.

I **[51]** The 90 days period was from date of the said dealership agreement on 22 May 2015 till 20 August 2015. The first month period when advertising income begun to become payable was therefore from 20 August 2015, rendering the first monthly payment of RM75,000 payable on 19 September 2015 and the 60th payment due on 19 August 2020.

[52] The remaining issue to be determined is whether the plaintiff's claim or any part thereof is barred by the Limitation Act. A

[53] I find that only part of the plaintiff's claim is statute-barred. My finding is based on the undisputed fact that the first defendant's promise, under cl 2.1(iii) of the said dealership agreement was a recurring contractual obligation. The advertising income was a fixed sum of RM75,000 per month as a periodic payment for 60 months. Each time the first defendant failed to pay the periodic advertising income when it fell due, it was *a discrete breach of contract* giving rise to a new cause of action. B C

[54] There is no 'running account' in this case because the defendants did not make even a single payment. The legal concept of a 'running account' is that a creditor's cause of action is extended by s 26(2) of the Limitation Act 1953 to cause the creditor's right to be deemed as having 'accrued on the date of the last payment' when there is a partial payment. If there is no partial payment at all — as in this case — there is no 'running account', and the debt that accrued earlier than six years prior to the filing of the writ of summons would be barred by s 6 of the Limitation Act 1953. Therefore, in this case, the plaintiff's cause of action is 'alive' only to claim the sum of advertising income that had accrued less than six years prior to the date of the filing of the writ of summons. D E

[55] I find support for my finding in a judgment of the Court of Appeal of Canada. In *Pickering Square Inc v Trillium College Inc* 2016 ONCA 179, the Court of Appeal for Ontario opined as follows: F

> [23] Breaches of contract commonly involve a failure to perform a single obligation due at a specific time. This sort of breach is sometimes called a 'once-and-for-all' breach: it occurs once and ordinarily gives rise to a claim from the date of the breach — the date performance of the obligation was due. Trillium's breach of s. 16.08 does not fall into this category because its obligation to operate its business was ongoing rather than single and time-specific. G
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> [24] A second form of breach of contract involves a failure to perform an obligation scheduled to be performed periodically — for example, a requirement to make quarterly deliveries or payments. A failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach: see eg *Smith v Empire Life Insurance Co* (1996) CanLII 8134; 19 CCEL (2d) 171 (Ont. Gen. Div.) ... (Emphasis added.) H

[56] The first defendant's obligation to collect and pay the plaintiff was scheduled to be performed periodically. As the writ of summons was filed on 18 April 2022, a contractual claim for any cause of action that arose prior to 18 April 2016 would be barred by s 6(1)(a) of the Limitation Act 1953. This means that the plaintiff's claim for the advertising income for the seven months I

period between 19 September 2015 and 19 March of 2016 are barred by the Limitation Act 1953.

[57] The upshot is that the plaintiff's claim must be reduced by seven months, from 60 months to a period of 53 months. The computation works out as follows: RM75,000 x 53 months = RM3,975,000.

CONCLUSION

[58] I reiterate that the first defendant was not acting merely as an introducer or facilitator for the second defendant. It received payment of RM3.15m from the plaintiff pursuant to the said dealership agreement under the first defendant's project.

[59] I hold the view that the terms of the said dealership agreement rendered the first defendant legally liable to collect a sum of RM75,000 per month for a period of 60 months and to pay over the same to the plaintiff. Therefore, though the primary paying party is the second defendant, the first defendant ought to be held jointly and severally liable to pay the contractual sum of RM75,000 per month to the plaintiff for the aforesaid period of 53 months that are not barred by the Limitation Act 1953.

[60] In conclusion, I decided that this court ought to grant judgment against the first defendant, to be held jointly and severally liable with the second defendant to pay the plaintiff the sum of RM3,975,000, interest at 5%pa on the judgment sum from the date of the writ (which was 18 April 2022) until date of payment. Lastly, costs of RM35,000 to be paid by the first defendant to the plaintiff

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh